

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Section 73.202(b)
FM Table of Allotments,
FM Broadcast Stations.
(Athens and Doraville, Georgia)
MB Docket No. 03-190
RM-10738

NOTICE OF PROPOSED RULEMAKING

Adopted: September 3, 2003

Released: September 5, 2003

Comments Date: October 27, 2003

Reply comments Date: November 12, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by Cox Radio, Inc. and CXR Holdings, Inc. ("Cox"), licensee of Station WBTS, Channel 238C1, Athens, Georgia, proposing the reallocation of Channel 238C1 from Athens, Georgia, to Doraville, Georgia, as the community's first local transmission service, and the modification of the authorization for Station WBTS to reflect the changes. Cox stated its intention to file an application for Channel 238C1 at Doraville, Georgia.

2. Cox filed this proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment. In considering a reallocation proposal, we compare the existing allotment to the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM Allotment priorities.

3. In support of the petition, Cox states that Channel 238C1 can be allotted to Doraville, Georgia, at the current authorized site of Station WBTS and as a result, no gain or loss areas will be created and the requisite city grade coverage will be provide to Doraville. The allotment will provide Doraville with its first local aural service while Athens would remain served by FM Station WFSH and AM stations WGAU, WRFC, and WXAG and non-commercial stations WMSL(FM), WUGA(FM) and WUOG(FM). Cox further states that Station WBTS is a pre-1964 grandfathered short-spaced station with two other stations that operate on third adjacent channels. Station WBTS currently is licensed to Athens, which is located in the Athens Urbanized Area. Its existing 70 dBu contour encompasses 134 square kilometers and 69 percent of the Athens Urbanized Area and 100 percent of the Gainesville, Georgia Urbanized Area. Cox points out that because no change in the Channel 238C1 allotment reference point is proposed, Station WBTS will continue to serve the Athens and Gainesville Urbanized Areas once the

1 See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

2 The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to given to priorities (2) and (3)], See Revision of FM Assignment Policies and Procedures, 90 FCC2d 88, 91 (1988).

channel is reassigned to Doraville. Cox indicates that a Tuck analysis is not necessary because Station WBTS already covers more than 50 percent of an urbanized area with a 70 dBu signal and is not proposing to change its transmitter site. Nonetheless, Cox submitted a *Huntington/Tuck* analysis to demonstrate that Doraville is a community independent of all urbanized areas, and therefore, merits a first local service preference.³

4. We believe Cox's proposal warrants consideration since the reallocation could provide Doraville with its first local aural transmission service under our allotment priorities. Retention of Channel 238C1 at Athens triggers Priority No. 4, other public interest matters, while reallocation of Channel 238C1 to Doraville triggers Priority No. 3, first local service. In addition, the proposed reallocation and change of community of license to Doraville would not result in a loss of local service to Athens since seven other stations are licensed to the community. A staff engineering analysis shows that Channel 238C1 can be allotted to Doraville in compliance with the Commission's spacing requirements at coordinates 34-07-32 and 83-51-32. Our analysis also indicates that there are three Urbanized Areas affected: Gainesville, Georgia, Athens-Clark County, Georgia, and Atlanta, Georgia. Since no site change is anticipated, coverage to the urbanized areas will remain unchanged. According to our analysis, Station WBTS currently covers 100 percent of the Gainesville, Georgia Urbanized Area, 64.9 percent of the Athens-Clark County, Georgia Urbanized Area and 32.8 percent of the Atlanta, Georgia Urbanized Area. A *Huntington/Tuck* analysis is unnecessary because Station WBTS is not migrating into an urbanized area but is already there.⁴

5. As an additional matter, Station WBTS is a pre-1964 grandfathered station. We recognize that in proposing this action, we are creating a new short-spaced allotment in contravention of Section 73.207 of the Rules. However, we have held that grandfathered FM stations that were in compliance with our Rules when authorized should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our rules, where there is no change in transmitter site.⁵ We propose to apply the same approach to the instant case. Cox will be required to specify its current licensed site for Station WBTS, Athens, Georgia, for the applications for a construction permit and a license for Station WBTS, Doraville, Georgia, since the change of community of license is protected as a grandfathered short-spaced station. Accordingly, as requested, we shall propose to modify the license for Station WBTS to specify operation on Channel 238C1 at Doraville, Georgia, as its new community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 238C1 at Doraville.

6. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>Community</u>	<u>Present</u>	<u>Channel</u>	<u>Proposed</u>
Athens, Georgia	238C1, 284C1		284C1

³ See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁴ See *Headland, Alabama and Chatahooche, Florida*, 10 FCC Rcd 10352 (M.M. 1995).

⁵ See *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (M.M. 1992), *Oceanside and Encinitas, California*, 15 FCC Rcd 15032 (M.M. 1999) and *Fremont and Holton, Michigan*, 14 FCC Rcd 17108 (M.M. 1999).

Doraville, Georgia

238C1

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached *Appendix* and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the *Appendix* before a channel will be allotted.

8. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments or counterproposals on or before October 27, 2003, and reply comments on or before November 12, 2003, and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Cox, as follows:

Kevin F. Reed
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D. C. 20036

9. Parties are required to file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁶

11. For further information concerning this proceeding, contact Kathleen Scheuerle, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioners constitutes an *ex parte*

⁶ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (February 9, 1981).

presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.